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In The

Supreme Court of the United States

October Term, 1996

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

VICKI BUTLER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit abused its discretion by denying Home Depot's petition for writ of mandamus which raised purely hypothetical issues and sought reversal of the district court's interlocutory order bifurcating the trial into liability and damages phases and certifying the liability phase under Federal Rule of Civil Procedure 23(b)(2)?

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STATEMENT OF THE CASE

This employment discrimination class action was filed by ten women, the respondents, who are current and former employees of petitioner, Home Depot U.S.A., Inc. ("Home Depot"). Respondents represent a class that includes female applicants to Home Depot's West Coast Division ("WCD") and former and current female employees of the WCD.

1. *Complaint Allegations.* Respondents allege that in the WCD Home Depot maintains a continuing policy and practice of denying employment, desirable job assignments, training, promotional opportunities, compensation and other terms and conditions of employment to women, in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e), *et seq.*, and the California Fair Employment & Housing Act, Cal. Gov't Code §§ 12900 *et seq.* Respondents contend that, in general, Home Depot segregates women into low-paying, dead-end cashier jobs, while placing men in sales positions where they are provided higher wages as well as the opportunity, encouragement, and training to move up Home Depot's promotional ladder. Respondents further allege that Home Depot allows its store managers, virtually all of whom are male, to make hiring, promotion, and compensation decisions based on vague and subjective criteria, and that this practice gives free reign to male managers' discriminatory stereotypes about women's interests and abilities.

Respondents request declaratory and injunctive relief, equitable relief in the form of back pay and front pay, and damages, to remedy the injuries sustained as a result of Home Depot's discriminatory policies and practices.

2. *The Class Certification Order.* After full briefing and oral argument, the district court ordered that the trial in this case would be bifurcated into two phases. *See* Petitioner's Appendix ("Pet'r App.") at 11a-12a. The first phase "will address liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages." *Id.* at 12a. The court certified the first phase of the action under Federal Rule of Civil Procedure ("Rule") 23(b)(2).[1]

The district court did not determine whether it would certify the second phase under Rule 23(b)(2) or Rule 23(b)(3), if at all.[2] The district court also deferred determination of whether the same jury, a different jury, or some other procedure would be used to resolve the second phase. That determination will be made if and when Home Depot is actually found liable for classwide discrimination: "If liability is established, the second

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[1] The class certified for the liability phase includes (a) all female employees of Home Depot within the WCD on or after November 5, 1992; and (b) all female applicants for employment at Home Depot within the WCD on or after November 5, 1992 who were qualified to fill positions of salespersons or assistant managers but who were not hired for those positions. Pet'r App. at 11a-12a.

[2] Certification of a class is appropriate under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2), unlike Rule 23(b)(3), does not provide class members the right to "opt out" of monetary relief. District courts are authorized, pursuant to Rules 23(c)(4) and 16(c)(12)-(13), to certify a class with respect to particular issues and to bifurcate complex actions involving multiple parties.

phase will address appropriate individual compensatory and equitable relief, including individual entitlement to back and front pay. The precise procedures to be used during the second phase, if any, will be determined later in this litigation." Pet'r App. at 12a.

The district court rejected Home Depot's argument that bifurcation of liability and damages would violate its Seventh Amendment right to a fair trial, even if different juries were empaneled to hear the two phases of the trial. The court noted that trial courts routinely bifurcate liability and damages issues, and that the Seventh Amendment only prohibits the reconsideration of a prior jury's determination. Because the separate juries in this case would be considering different issues, Home Depot's Seventh Amendment claim had no merit. Pet'r App. at 23a.

The district court also rejected Home Depot's claim that certification of the liability phase under Rule 23(b)(2) is improper, finding that in the liability phase, respondents' "claims for damages are clearly secondary to their primary claim for injunctive relief to prohibit gender-biased employment practices." Pet'r App. at 20a.[3]

3. *The Petition for Writ of Mandamus.* Home Depot requested the district court to certify its class certification order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court denied that request. Home Depot then petitioned the Ninth Circuit for a writ of mandamus to compel the district court to vacate its order

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[3] Home Depot did not argue that certification under Rule 23(b)(2) violates the Due Process Clause of the Fifth Amendment. That claim is raised by Home Depot for the first time in its petition for writ of certiorari. *See infra* Section III.

certifying the class, enter a new order denying certification, and dismiss the class allegations. The Ninth Circuit denied Home Depot's request for the extraordinary remedy of mandamus. Pet'r App. at 1a-2a.

REASONS THE WRIT SHOULD BE DENIED

The only question presented by this petition is whether the Ninth Circuit abused its discretion by denying Home Depot's petition for writ of mandamus. This issue is not worthy of the Court's review. Indeed, this Court has never granted certiorari to review a court of appeals' refusal to issue a writ of mandamus overturning an interlocutory order granting or denying class certification.

In its petition, Home Depot virtually ignores the procedural posture of this case, and defines the questions presented to the Court as if the Ninth Circuit had issued an opinion upholding a final order in this case. It did not. There is no final order below, and the Ninth Circuit has not issued an opinion in this case.

Even if there was an appealable, final order in this case, the issues Home Depot describes in its petition would still be unworthy of this Court's review. Not a single court of appeals has yet addressed the question whether the traditional practice of bifurcating liability and damages issues in a Title VII class action now violates the Seventh Amendment because the 1991 Civil Rights Act provides a right to a jury trial. The other question which Home Depot raises in its petition – whether certification of a Title VII class action under Rule 23(b)(2) violates the due process rights of class members – was not raised in either court below. Home Depot

cannot properly raise the due process issue in this Court, because it has no standing to represent the interests of class members. Home Depot thus seeks the Court's review of one issue that has not even been addressed by a court of appeals, and another issue which Home Depot has no standing to raise and which was not addressed below.

The most perplexing aspect of Home Depot's petition for certiorari, however, is its failure to acknowledge that the issues it raises are purely hypothetical. Home Depot's Seventh Amendment claim will become ripe if, and only if, all three of the following events occur: (1) Home Depot loses the liability phase of the trial and is found guilty of classwide discrimination; (2) the district court certifies the damages phase of the trial and decides that a different jury or juries should hear the damages phase; and (3) the district court allows the jury in the damages phase to reconsider issues already determined by the jury in the liability phase. Home Depot's due process claim will become ripe if, and only if, these events occur: (1) Home Depot loses the liability phase of the trial and is found liable for classwide discrimination; (2) the district court certifies the damages phase of the trial under Rule 23(b)(2) instead of Rule 23(b)(3), thereby denying class members the right to opt out of the monetary relief; and (3) a class member chooses to challenge the final order or settlement agreement.

None of the foregoing events has occurred, and the district court has given Home Depot no reason to believe that they necessarily will. Yet, until all of those events have occurred, Home Depot's stated concerns that different "follow up" juries will be empaneled in the damages phase, and that class members will not be allowed to opt

out of the monetary relief, merely invite this Court to speculate about future events.

Simply stated, Home Depot's petition for writ of certiorari requests this Court to engage in piecemeal appellate review of errors allegedly committed in interlocutory rulings by a district court, which are purely hypothetical and implicate no split among the circuits, without even the benefit of an opinion from the court of appeals. Home Depot's extraordinary request should be denied.

I.

THE QUESTION WHETHER THE NINTH CIRCUIT ERRED IN DENYING MANDAMUS IS NOT WORTHY OF THE COURT'S REVIEW.

The standards governing the exercise of a federal court's discretion in granting and denying mandamus petitions are well settled and uncontroverted. Under these standards, the Ninth Circuit was more than justified in denying Home Depot's request for the extraordinary remedy of mandamus.

A. The Standards for Issuance of a Writ of Mandamus Are Well Established by this Court.

This Court has long recognized that the remedy of mandamus is "among the most potent weapons in the judicial arsenal," and should be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980). Traditionally, the writ of mandamus has been used in the federal courts "only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

Will, 389 U.S. at 95, quoting *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943). The extraordinary writs do not reach cases in which "the most that can be claimed . . . is that [a judge] may have erred in ruling on matters within his jurisdiction." *Id.* at 104. Only exceptional circumstances, "amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chem.*, 449 U.S. at 36.

The reasons for the "chary authorization" of mandamus as an extraordinary remedy are well established. *See, e.g., Allied Chem.*, 449 U.S. at 36. The use of mandamus has the "unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation." *Id.* It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. *Will*, 389 U.S. at 96. Accordingly, "a judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by [the] judgment of Congress." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 404 (1976).

In order to ensure that the writ of mandamus is issued only in extraordinary circumstances, this Court requires that the party seeking mandamus demonstrate that it has no other adequate means to attain relief, and that its "right to issuance of the writ is clear and indisputable." *Allied Chem.*, 449 U.S. at 36 (internal cites omitted). The decision whether to issue the writ under these standards is largely a matter of discretion with the court to which the petition is addressed. *Kerr*, 426 U.S. at 404.

B. The Ninth Circuit Did Not Abuse Its Discretion by Denying the Petition for Writ of Mandamus.

The Ninth Circuit did not abuse its discretion by denying Home Depot's petition for writ of mandamus. The two requirements for issuance of the writ of mandamus – that the party have no other adequate means to attain relief, and that its right to the writ be "clear and indisputable" – were plainly not met in this case. *Allied Chem.*, 449 U.S. at 36.

Home Depot has other means to attain relief, as it is free to seek review of the class certification order on direct appeal after a final judgment is entered. *See, e.g., Allied Chem.*, 449 U.S. at 37 (ordering of a new trial did not justify the issuance of mandamus, because "[a] litigant is free to seek review of the propriety of [the] order on direct appeal after a final judgment has been entered"). Home Depot is also free to seek modification of the class certification order in the district court if future events require reconsideration of that decision.[4]

In addition, Home Depot's right to the writ of mandamus was far from "clear and indisputable." The district court did not usurp judicial power or refuse to exercise its jurisdiction when it should have. *See, e.g., Kerr*, 426 U.S. at 403. Nor did the district court engage in a pattern

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[4] Rules 23(c)(1) and 23(d)(1) grant the district court the authority to alter or amend a class certification order, and to make appropriate procedural orders to assure fairness to the parties and manageability of the action. Thus, Home Depot may seek relief from the district court on the ground that new circumstances or legal developments require modification of the order, or it may seek review of the class certification order on direct appeal from a final order.

of blatantly unlawful conduct warranting immediate intervention by an appellate court. *Cf. LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). To the contrary, the district court carefully considered the briefs submitted by both parties, concluded that certification of the liability phase of the trial was appropriate, and decided to bifurcate the trial to enhance its manageability – acts which were well within its jurisdiction. As a result, the most that can be said of Home Depot's mandamus petition is that it alleges the district court erred on matters within its jurisdiction. However, this Court has repeatedly made clear that the extraordinary writs do not reach such cases. *See, e.g., Will*, 389 U.S. at 104.

Given that mandamus is not appropriate to cure erroneous rulings by a trial court, mandamus is clearly not appropriate where, as here, a party raises purely hypothetical issues. In this case, the district court has not yet certified the damages phase of the trial, or determined whether the same jury or different juries will hear the damages phase if Home Depot is found liable for classwide gender discrimination. If Home Depot wins the liability phase of the trial, there will be no damages phase and no possibility that another jury will be involved in this case. If Home Depot loses the liability phase of the trial, the district court will still have to decide whether the same jury or different juries should consider the damages issues, and whether the damages phase should be certified under Rule 23(b)(2), or under Rule 23(b)(3), which provides class members the right to opt out of monetary relief. Thus, Home Depot's claim that the Seventh Amendment prohibits a different jury from considering the damages issues, as well as its claim that class members' due process rights will be violated if they are

not provided the right to opt out of the damages phase, are hypothetical and not ripe for review. The Ninth Circuit did not abuse its discretion by declining to review, on a petition for writ of mandamus, an interlocutory order presenting issues that are not even ripe.

C. There Is No Merit to Home Depot's Claim that Mandamus Should Be Routinely Available to Defendants Challenging Class Certification Orders.

Home Depot does not argue in its petition that the Ninth Circuit abused its discretion by failing to comply with the governing standards when denying the mandamus petition. Instead, Home Depot argues that an exception should be made to the well-established rules governing mandamus whenever a defendant seeks review of a class certification order. According to Home Depot, writs of mandamus should be routinely granted to defendants who wish to challenge class certification orders because "the reality is that these important cases and issues *must* be reviewed on mandamus or interlocutory review if they are to be reviewed at all." Pet'r Br. at 28 (emphasis in original). Home Depot claims such review is necessary because defendants face intense pressure to settle large class actions.

Home Depot's arguments were rejected by this Court long ago. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court refused to create an exception to the final order rule which would allow interlocutory appeal of class certification orders. In that case, the petitioner argued that a court's order denying class certification should be subject to interlocutory review, because most plaintiffs "may find it economically imprudent to pursue

his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 470-71. That argument was rejected.

The Court acknowledged that intense economic pressures "may induce a plaintiff to abandon his individual claim" rather than pursue a final judgment and appeal, but concluded that "the appealability of any order entered in a class action" must be determined by the "same standards that govern appealability in other types of litigation." 473 U.S. at 471.[5] The Court emphasized that Congress, not the Court, should make the exception to the final order rule suggested by petitioner, if such an exception is warranted. *Id.* at 473. The Court also observed that an argument for appealability based on economic pressures could also be made by defendants in class actions, and that such an argument would be equally devoid of merit:

> [W]hether to certify, and if so, how large the class should be – will often be of critical importance to defendants as well. Certification of a large class may so increase the defendant's potential damages liability and litigation costs

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[5] The principle articulated by the Court in *Coopers & Lybrand*, 437 U.S. at 471, was not new or novel. The federal courts have long recognized that the decision to grant interlocutory review should not be influenced by a party's claim that denial of review would result in settlement or financial hardship. *See, e.g., Allied Chem.*, 449 U.S. at 37 (despite expense involved in litigating a new trial, ordering of new trial does not justify issuance of mandamus); *In re Master Key Antitrust Litig.*, 528 F.2d 5, 14 (2nd Cir. 1975) (ordering of separate trials on the liability and damage issues not immediately appealable despite argument that the cost of conducting separate "mini trials" would be prohibitive and would force the defendants into an unfavorable settlement).

> that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory. Whatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.

Id. at 477.

In view of this Court's clear statement on the issue in *Coopers & Lybrand*, there is no merit to Home Depot's claim that the Ninth Circuit should have granted its mandamus petition, despite the interlocutory nature of the order below, simply because Home Depot may feel pressured to settle this case.[6]

D. Home Depot's Hypothetical Seventh Amendment Claim Does Not Justify Interlocutory Review.

Home Depot's argument that this Court should grant interlocutory review of this case "in light of the important Seventh Amendment rights at stake" does not withstand scrutiny. Pet'r Br. at 28. No Seventh Amendment rights are currently at stake, because the district court has not yet determined whether it will even certify the damages phase of the trial. If it does certify the damages phase, it is not clear that a different jury will be empaneled for that phase; nor is it likely that a different jury in the damages

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[6] Home Depot's argument is particularly inappropriate in the Title VII context, as this Court has recognized the strong public policy in favor of settling Title VII claims, due to Congress' "strong preference" for "encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

phase would be permitted to revisit issues which were already decided in the liability phase.

Home Depot cites two Supreme Court cases for the proposition that "[t]his Court has not hesitated to grant certiorari at an interlocutory stage" where a violation of the Seventh Amendment has been alleged. *See* Pet'r Br. at 28, citing *Dairy Queen Inc. v. Wood*, 369 U.S. 469, 472 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). Neither of those cases is on point. In both cases, jury trials were denied to the petitioners, in clear violation of the Seventh Amendment. In this case, a jury trial was *granted* to Home Depot on the question of classwide liability, and the district court has given no indication that it intends to deny Home Depot a proper jury trial on damages.

Home Depot's claim is that the district court, by bifurcating the trial, potentially could empanel a different jury to hear the damages phase and, if that occurred, the Seventh Amendment could be violated if the liability and damages issues are not properly severed. However, that is a bifurcation issue, not an issue of whether Home Depot is entitled to a jury trial. It is well settled that, although bifurcation orders often implicate the Seventh Amendment, a court order bifurcating a case for separate trials is not subject to interlocutory review. *See, e.g., Travelers Indem. Co. v. Miller Mfg. Co.*, 276 F.2d 955 (6th Cir. 1960); *Master Key*, 528 F.2d at 14. Indeed, if every bifurcation order qualified for immediate appellate review, courts of appeals would be buried in requests to review interlocutory orders. Such a result would clearly conflict with the "policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it." *Allied Chem.*, 449 U.S. at 37.

In sum, there is no justification for granting Home Depot's petition for certiorari seeking review of the Ninth Circuit's refusal to issue a writ of mandamus in this case. The standards governing the writ of mandamus are well established, and the Ninth Circuit did not err in interpreting them. Indeed, the orders about which Home Depot complained in the Ninth Circuit were interlocutory and the issues it described were purely hypothetical. The issues have not ripened since then. Home Depot has not yet been found guilty of classwide discrimination, and the district court has not yet decided whether to certify the damages phase under Rule 23(b)(2) or Rule 23(b)(3), if at all. In addition, no decision has yet been made regarding whether the same jury or different juries will resolve the damages issues, if Home Depot is found liable for classwide discrimination. As a result, granting certiorari would require review of issues which are not close to being ripe and consideration of possible errors which could easily be cured on direct appeal in the ordinary course of litigation. For these reasons, the Court should decline to grant review of the case in this procedural posture, and should adhere to the long-standing rule against piecemeal appeals articulated by Congress and this Court.

II.

THE SEVENTH AMENDMENT QUESTION PRESENTED BY HOME DEPOT IS NOT WORTHY OF CERTIORARI.

Even if the Ninth Circuit had issued an opinion in this case from an appealable final order addressing the issues presented in Home Depot's petition, Home Depot's argument that the district court's bifurcation of liability

and damages issues violates the Seventh Amendment would not be worthy of certiorari. There is no split between the circuits regarding the question whether bifurcation of Title VII class actions is proper. That issue was resolved by this Court twenty years ago in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), and has not been called into question by the 1991 Civil Rights Act.

A. Bifurcation of Title VII Class Actions Has Been Well Established Since this Court's Decision in Teamsters.

Home Depot virtually ignores the seminal decision in *Teamsters*, 431 U.S. at 358-62, in which this Court expressly determined that Title VII class actions such as this one should be separated into two stages addressing liability and damages. *Teamsters* succinctly explains:

> The plaintiff[s'] initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer. . . . At the initial, 'liability' stage of a pattern or practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. . . . If an employer fails to rebut the inference that arises from the [plaintiffs'] prima facie case, the trial court may then conclude that a violation has occurred and determine the appropriate remedy. . . . When the [plaintiff class] seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the

> liability phase to determine the scope of individual relief. . . . The proof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that policy. The [plaintiff] need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. . . . [T]he burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Id. at 360-62, citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771-72 (1976).

Importantly, *Teamsters* clarified that the facts determined at the first stage may *not* be reconsidered during the second stage. "[T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. *The force of that proof does not dissipate at the remedial phase of the trial.*" 431 U.S. at 361-62 (emphasis added).[7]

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[7] Numerous courts have successfully followed the *Teamsters* procedure for trying Title VII class actions. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1434 (9th Cir.), *modified on other grounds*, 742 F.2d 520 (9th Cir. 1984); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1277 (8th Cir. 1977); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1053-56 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *see also, Manual for Complex Litigation, Third* § 33.54 (1995) ("Employment discrimination class actions have commonly been tried in separate stages under Rule 42(b)."); Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 24-123, p. 24-414 (3d ed. 1992) ("The majority of courts have held the bifurcation of class liability and relief phases of Title VII suits to be an appropriate means of litigating employment discrimination claims.").

In accordance with the Court's direction in *Teamsters*, the district court bifurcated this Title VII class action into separate stages addressing classwide liability and damages. *See supra* pp. 2-3.[8] Bifurcation is also permitted under Rule 42(b), which gives courts the authority to separate issues for trial when "separate trials will be conducive to expedition and economy."[9] The district court's order thus comports with the procedure established by this Court and the Federal Rules of Civil Procedure for trying Title VII class actions.[10]

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[8] Home Depot summarily asserts that the class certification order "is a far cry from the customary bifurcation of all liability issues from all damages issues," Pet'r Br. at 10, but fails to explain how the district court's bifurcation varies at all from the separation of issues ordered in *Teamsters*. *See supra* pp. 2-3. (describing clear bifurcation of liability and damages in district court's order).

[9] The district court's bifurcation order was also within the authority granted by Rule 23(d)(1), which allows courts to make appropriate orders concerning the procedure by which class actions are litigated, including "determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument," and Rule 16(c), which allows the district court to make necessary orders governing the conduct of trials.

[10] The decision whether to bifurcate a trial on the issues of liability and damages lies in the discretion of the district court. *See, e.g., Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993); *Helminski v. Ayerst Lab.*, 766 F.2d 208, 212 (6th Cir.), *cert. denied*, 474 U.S. 981 (1985).

B. The District Court's Bifurcation Order Does Not Threaten Home Depot's Seventh Amendment Rights.

Home Depot argues that the 1991 Civil Rights Act, which provides the right to a jury trial in Title VII cases seeking damages, rendered unconstitutional the traditional practice of bifurcating Title VII class actions. According to Home Depot, the Seventh Amendment prohibits different juries from hearing the liability and damages phases of a Title VII class action. In making this argument, Home Depot assumes that a different jury will hear the second phase of this case and that the trial court will have to allow the new jury to revisit the issues determined by the first jury. Neither assumption is correct.

In *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931), this Court held that it is consistent with the Seventh Amendment to allow separate juries to hear different issues, so long as the issues tried to the separate juries are "distinct and separable," such that the second jury will not revisit issues determined by the first jury. 283 U.S. at 499. In *Teamsters*, the Court explained that the issue of liability can and should be cleanly severed from issues of damages. *See supra* Section II.A. Indeed, employment discrimination cases brought under 42 U.S.C. § 1981 alleging intentional discrimination on the basis of race have *always* carried the right to a jury trial and are often certified as class actions and bifurcated.[11] Home Depot

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[11] *See, e.g., Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 39 (6th Cir. 1990) (class action brought under 42 U.S.C. § 1981 certified and trial bifurcated into liability and damages phases); *Salinas v. Roadway Exp., Inc.*, 735 F.2d 1574, 1576 (5th Cir. 1984)

cites no case finding that bifurcation of class actions brought under 42 U.S.C. § 1981 violates the Seventh Amendment. Thus, Home Depot's argument that liability and damages issues in employment discrimination class actions are not "distinct and severable" issues is put to rest by *Teamsters*.

Home Depot hopes to avoid this result by incorrectly applying the framework for an *individual* employment discrimination case to this class action. Home Depot cites *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), for the proposition that the jury in the damages phase must reconsider the "totality of the evidence," including all of the evidence regarding classwide discrimination considered by the jury at the liability stage. Pet'r Br. at 11-13. This is incorrect. *St. Mary's* clarifies the procedure for trying an individual employment discrimination case, which is clearly distinct from the procedure in Title VII class actions. *Compare Teamsters*, 431 U.S. at 358-63 (governing Title VII class actions), *with McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (governing individual discrimination claims). This Court has repeatedly distinguished the procedures used in Title VII class actions from those applied in individual cases. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 868-72 (1984); *Teamsters*, 431 U.S. at 358-60; *Franks*, 424 U.S. at 751.[12]

(same); *Domingo*, 727 F.2d at 1433-34 (same). Congress directed courts applying the 1991 Civil Rights Act to be guided by the jurisprudence developed in 42 U.S.C. § 1981 cases. H.R. Rep. No. 102-40 Part II, 102nd Cong. (May 17, 1991).

[12] *St. Mary's* explains that, in an individual Title VII disparate treatment case, the plaintiff must carry the burden of establishing that the defendant discriminated against him or her under the "totality of the circumstances." 509 U.S. at 505-10.

Home Depot paints a picture of how two of the claims in this case will be litigated, a picture incorrectly based on the *St. Mary's* model for trying individual cases. *See* Pet'r Br. at 12-14. The assumption in these examples – that Home Depot will be allowed to raise issues in the damages phase that have already been determined in the liability phase – was flatly rejected in *Teamsters*. 431 U.S. at 361-62. In *Teamsters*, this Court stated that, at the damages phase, "the employer cannot . . . claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking." *Id.* at 363.[13] The only issue in the damages phase is whether particular class members were harmed by the defendant's policy and practice of discrimination. In making this determination, each class member will be entitled to a presumption that adverse decisions

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This holding is inapplicable to the damages phase of a Title VII class action, where the defendant's liability for classwide discrimination has already been proven at the first stage and the individual class member is entitled to a presumption during the damages phase that he or she was injured by this discriminatory conduct. *See Teamsters*, 431 U.S. at 461-62; *see also supra* Section II.A.

[13] *See also, Franks*, 424 U.S. at 751-72 (despite finding after first stage of pattern or practice Title VII class action that defendant had engaged in classwide discrimination, district court refused to grant any relief because each individual class member had not demonstrated that he or she was the victim of discrimination; this Court reversed, finding that "by demonstrating the existence of a discriminatory hiring pattern and practice" the plaintiffs had demonstrated a prima facie case against individual class members; burden at that point shifted to the employer to show that certain individual class members were not victims of discrimination).

concerning her initial job assignment and rate of pay were made "in pursuit" of the discriminatory policies and practices proved at the first stage. Home Depot will not be allowed to rebut this presumption by re-litigating the question whether it is guilty of classwide discrimination.[14] As explained in *Teamsters*, "the force of that proof does not dissipate during the remedial phase of the trial." 431 U.S. at 361-62.[15]

C. There Is No Split Between the Circuits Concerning Whether Title VII Class Actions Can Be Bifurcated Without Violating the Seventh Amendment.

Home Depot's argument that the circuits are split on the question whether bifurcation of Title VII class actions violates the Seventh Amendment is groundless. Home

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[14] Home Depot also argues that, pursuant to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989), it will be allowed to introduce different statistics at the second stage than were used in the first stage to establish classwide discrimination. Pet'r Br. at 12 n.3. This argument, again, contravenes the accepted procedure for trying pattern and practice cases. *Wards Cove* clarifies the type of statistics that can be introduced during the *first* stage to demonstrate classwide discrimination. 490 U.S. at 650. It says nothing about whether, or how, statistical evidence may be properly used during the second stage.

[15] If Home Depot's argument were accepted, certification of Title VII class actions alleging intentional discrimination would always be unconstitutional, because the bifurcation mandated by *Teamsters* would always violate the Seventh Amendment. *See* Pet'r Br. at 19. This result would be contrary to Congress's intent in adopting the 1991 Civil Rights Act, which was to "strengthen existing protections and remedies under the federal civil rights laws to provide more effective deterrents and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40 Part II, 102nd Cong. (May 17, 1991).

Depot asserts that the Ninth Circuit's decision in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), conflicts with Seventh Circuit's decision in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, *cert. denied*, 116 S. Ct. 184 (1995), and the Fifth Circuit's decision in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). However, these cases involve mass tort product liability claims, and thus do not raise issues relevant to whether Title VII class actions can properly be bifurcated. Further, contrary to Home Depot's depiction, the *Valentino* court did not even reach the Seventh Amendment issue, stating that the "constitutional issues were never squarely presented to the district court." 97 F.3d at 1230.[16]

The question whether it is appropriate to bifurcate a case under Rule 42(b) is highly case-specific, as it requires the trial court to assess the types of claims, defenses and evidence that will arise at each stage in order to decide whether the issues can be severed in accordance with *Gasoline Products*.[17] Mass tort cases are therefore not

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[16] Home Depot also asserts that the Ninth Circuit took an "inhospitable view" of the Seventh Amendment in *Arthur Young & Co. v. United States Dist. Ct.*, 549 F.2d 686, 696 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977), simply because it found that class issues in a securities case could be cleanly severed from separate defenses that might be raised to defeat claims of individual class members. *Id.* at 693-94. A finding that the Seventh Amendment is not violated under the specific facts of a single case hardly represents an "inhospitable view" towards that constitutional provision.

[17] *See In re Bendictin Litig.*, 857 F.2d 290, 307 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) ("Neither Rule 42(b) nor the [Advisory Committee Notes] give[ ] any precise guidelines for the trial judge in considering the propriety of ordering separate trials, probably because of the wide variety of circumstances in

instructive to the question whether Title VII class actions can properly be bifurcated because they involve entirely different legal questions and types of proof. In deciding whether it is constitutional to bifurcate a product liability class action, for example, a court must often resolve whether the determination of a defendant's negligence to the class, a "common" issue to be tried at the first stage, can be severed from individual issues such as comparative negligence, which would be determined at the second stage. The determination of comparative negligence requires the trier of fact to consider whether the plaintiff's own conduct contributed to his injury, thus potentially requiring a comparison between the plaintiff's and defendant's negligence. *See, e.g., Castano*, 84 F.3d at 749-50; *Rhone-Poulenc*, 51 F.3d at 1303. These concerns are not relevant to the bifurcation of Title VII class actions, which involve entirely different claims, defenses and evidence.[18]

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which it might come into play. Consequently, courts have adopted a case-by-case approach."); *Southern Ry. Co. v. Tennessee Valley Authority*, 294 F.2d 491, 494 (5th Cir. 1961) ("Essentially, the question [of separation of trials] is one that seems to depend on the facts of each case, a matter to be determined by the trial judge exercising sound discretion.").

[18] Home Depot cites several other cases which do not involve bifurcation of Title VII class actions and thus are not indicative of a split between the circuits. *See Franchi Const. Co. Inc. v. Combined Ins. Co. of America*, 580 F.2d 1, 2 (1st Cir. 1978) (in individual breach of contract action, district court improperly ordered a second jury to address many of the same issues heard by the first jury after realizing it had ruled erroneously on the measure of plaintiffs' damages); *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993) (in an individual contractual indemnity case, court determined that tort and contract claims could be tried to separate juries); *see also, Central*

Home Depot cites two district court decisions that raise concerns about whether certification of Title VII class actions under the 1991 Civil Rights Act creates a potential violation of the Seventh Amendment. *See McKnight v. Circuit City Stores, Inc.*, 168 F.R.D. 550, 552-53 (E.D. Va. 1996); *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 470-71 (W.D. La. 1995).[19] Two isolated district court decisions do not represent a split between the circuits requiring resolution by this Court.[20] *See* Robert L.

Wesleyan College v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993) (products liability); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (products liability); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (products liability); *In re School Asbestos Litig.*, 789 F.2d 996 (3rd Cir.), *cert. denied*, 479 U.S. 915 (1986) (products liability); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978) (securities); *In re Copley Pharmaceutical, Inc.*, 161 F.R.D 456 (D. Wyo. 1995) (products liability).

[19] *Celestine v. Citgo Petroleum Corp.* is currently under appeal in the Fifth Circuit. *See* Resp't App. at 1a.

[20] Home Depot cites four other district court decisions analyzing motions for class certification in Title VII class actions under the 1991 Civil Rights Act. None of these courts raised concerns about the Seventh Amendment. In three of these cases, the court denied class certification because, after a detailed, fact-specific analysis, it found that the plaintiffs could not show the typicality and commonality required by Rule 23. *See Brooks v. Circuit City Stores, Inc.*, 1996 U.S. Dist. LEXIS 9869 (D. Md. 1996); *Appleton v. Deloitte & Touche LLP*, 168 F.R.D 221 (M.D. Tenn. 1996); *Zapata v. IBP, Inc.*, 167 F.R.D. 147 (D. Kan. 1996). One court granted class certification. *Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 (M.D. Fla. Mar. 12, 1996). These district court cases, on the highly case-specific question of whether a particular class fulfills the requirements of Rule 23, do not represent a split in the circuits as to whether Title VII class actions can ever be certified under the 1991 Civil Rights Act.

Stern et al., *Supreme Court Practice* 178-79 (7th ed. 1993). Further, to the extent these district courts determined in error that the Seventh Amendment prohibits class certification of Title VII class actions seeking damages, the appellate court, not this one, is the proper forum to correct these errors. *Id.* at 193.

III.

THIS CASE SHOULD NOT BE HELD PENDING THE COURT'S DECISION IN *ADAMS V. ROBERTSON.*

In a last-ditch attempt to capture the attention of this Court, Home Depot argues that this case should be "held" or "substituted" for *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995), *cert. granted*, 117 S. Ct. 37 (1993). For the reasons stated below, the Court should decline Home Depot's invitation to delay this litigation unnecessarily.

Home Depot claims that this Court is interested in resolving the questions presented in *Adams* and *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), and that the interests of justice would be best served if the Court granted review of a case that raised the issue in *Adams* as well as the issue in *Ticor*. Home Depot may be right that

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Home Depot also mentions two other lawsuits in which it has been sued for classwide gender discrimination. *See Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996); *Tortajada v. Home Depot, Inc.*, No. 96-2927 (D.N.J.). In *Griffin*, the district court denied Home Depot's motion to dismiss the complaint's class allegations, and stated in dicta that certification of the class under Rule 23(b)(3), rather than Rule 23(b)(2), might be appropriate. 168 F.R.D. at 191-92. The question whether the class should be certified and, if so, under what provision, has not yet been briefed in that case. This action is the only suit against Home Depot that has, as of yet, progressed to the class certification stage.

review of such a case would be desirable; however, it is wrong that this petition provides an appropriate vehicle for resolution of the questions presented in those cases.

To begin with, Home Depot did not raise below the issue which it claims is related to the questions presented in *Adams* and *Ticor*. Home Depot argues for the first time in its petition for certiorari that certification of the class under Rule 23(b)(2) violates the Fifth Amendment due process rights of class members, because Rule 23(b)(2) does not afford class members the right to opt out of the monetary relief. Home Depot argued in its briefs to the district court and the Ninth Circuit that certification under Rule 23(b)(2) was inappropriate, but it never claimed that certification under that provision is unconstitutional. As a result, there is no decision by the court of appeals or the district court regarding Home Depot's Fifth Amendment due process claim. This Court should not grant review of an issue which the courts below have not had the opportunity to consider or address.

Even if the due process issue had been raised below, Home Depot could not properly raise it in this Court, because Home Depot does not have standing to represent the interests of class members. Home Depot may assert its own legal interests before this Court, but it does not have standing to vindicate the rights of others. *See, e.g., Baker v. Carr*, 369 U.S. 186, 204 (1962) (standing requirement is aimed at "assur[ing] that concrete adverseness which sharpens the presentation of [the] issues upon which the court so largely depends").

In a footnote, Home Depot cites *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for the proposition that it does have standing to raise its opponents' constitutional

rights. In *Shutts*, the Court held that, because the defendant "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata," it had standing to raise the question whether the district court had personal jurisdiction over the entire plaintiff class. *Id.* at 806. By contrast, in this case, Home Depot has no legitimate interest in ensuring that class members can "opt out" of monetary relief, other than its potential interest in reducing the size of the plaintiff class – an interest which is antagonistic to the class and which certainly cannot confer standing upon Home Depot to represent the interests of class members. *See, e.g., Baker*, 369 U.S. at 204.[21] Therefore, contrary to Home Depot's suggestion, this case cannot properly be "substituted" for *Adams* because Home Depot lacks standing to assert the due process rights of class members in this Court.

Significantly, even if Home Depot had standing to raise the due process issue and had raised the issue below, this case still should not be "substituted" or "held" for *Adams* because *Adams* is not relevant to this case. The issue in *Adams* is whether approval of a mass tort settlement binding on a Rule 23(b)(2) class, with no opt out right, violates due process when all class members suffered individual monetary damages but the settlement agreement provided no compensation to the majority of class members whose claims were released. This case, in contrast, is a Title VII class action in which only the liability phase of the trial has been certified

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[21] In both *Adams* and *Ticor* the petitioners before the Court had standing because they were class members, not defendants, who objected to class certification and approval of the settlement order in both the trial and appellate courts. *See Adams*, 676 So. 2d at 1268; *Ticor*, 114 S. Ct. at 1362-1363.

under Rule 23(b)(2). It remains to be determined whether the damages phase of the trial will be certified under Rule 23(b)(2) or Rule 23(b)(3), which provides class members the right to opt out of monetary relief. Thus, the issue in *Adams* is not relevant here, since the class members in this case have not been denied the right to opt out of the monetary relief, and may well be granted that right if the district court certifies the damages phase of the trial under Rule 23(b)(3).

Home Depot's contention that the Court's forthcoming decision in *Adams* will be relevant to whether the district court properly certified the liability phase of this trial under Rule 23(b)(2) is simply wrong. There is no question that the liability phase, which addresses "liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether the defendant is liable for punitive damages," is properly certified under Rule 23(b)(2). Pet'r App. at 12a. Home Depot has not suggested otherwise. Home Depot's stated concern is that class members will not be allowed to opt out of the individual monetary relief, an issue which will be decided in the damages phase.

The Court's decision in *Adams* may become relevant to this case if the following events occur: (a) Home Depot loses the liability phase of the trial, (b) the district court certifies the damages phase of the trial under Rule 23(b)(2), instead of Rule 23(b)(3), (c) a final order is entered, and (d) a class member chooses to challenge the order. *Adams* could also become relevant in the unlikely event that a settlement agreement is reached in which most of the class members' monetary claims are extinguished and no right to opt out of the monetary relief is provided. Unless and until the foregoing events occur,

the question whether class members will be bound by a final order or settlement agreement that does not allow them to opt out of the monetary relief is completely hypothetical and calls for speculation about future factual developments and potential court orders. There is no reason to engage in such speculation, because regardless of whether a final order is entered or a settlement agreement is eventually reached, class members will be free to challenge those decisions on due process grounds in the district court and the court of appeals, just as the petitioners did in *Adams* and *Ticor*.

Finally, there is no reason to "hold" Home Depot's petition, even if *Adams* were relevant to any of the issues which have been decided in this case. This Court generally "holds" petitions to prevent an improper final judgment from being secured which could be corrected if the case was held until the Court issues an opinion in a related case. Stern et al., *supra* 243-44. After the related case is decided, the Court can remand the "held" case to the lower court for reconsideration in light of the new opinion. This procedure is both unnecessary and unwise, however, when a party files a petition for writ of certiorari from an interlocutory order which can be modified in the district court and reviewed on appeal.

If anything in the *Adams* decision becomes relevant to the issues in this case at any stage of this litigation, Home Depot may request the district court to modify or amend the class certification order in light of that development in the law. *See* Fed. R. Civ. P. 23(c)(1), 23(d)(1). Similarly, after a final order has been entered, Home Depot can appeal the order to the Ninth Circuit on the ground that *Adams*, or any other opinion which is issued between now

and the date of Home Depot's appeal from final judgment, compels a different result. Accordingly, no judicial purpose will be served by holding this case for *Adams*, and it may result in further delay of this litigation, which has already been pending for more than two years. Respondents therefore respectfully request that Home Depot's petition be denied forthwith, rather than held pending the Court's decision in *Adams*.

CONCLUSION

Home Depot's petition for certiorari presents none of the bases for certification enumerated in Supreme Court Rule 10. The hypothetical issues it presents are not ripe for review and would require this Court to engage in inappropriate speculation about future events. For the reasons stated, Home Depot's petition for certiorari should be denied.

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30489

JAMES E. ALLISON, ET AL.

Plaintiffs – Appellants

JONATHAN ANDERSON; DANIEL COX; RUSSELL METOYER; HILLERY RANDELL; LEO P. REEDER

Intervenors – Plaintiffs – Appellants

v.

CITGO PETROLEUM CORP.

Defendant – Appellee

Appeal from the United States District Court
for the Western District of Louisiana, Lake Charles

(Filed Dec. 17, 1996)

ORDER:

IT IS ORDERED that appellants' motion to reinstate the appeal is granted.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES
CIRCUIT JUDGE